# No. 12,092

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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THOMAS L. OLDFIELD,
*Appellant,*

vs.

SS ARTHUR P. FAIRFIELD, her engines, boilers, tackle, apparel and furniture, and AMERICAN PACIFIC STEAMSHIP COMPANY (a corporation),
*Appellees.*

**Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.**

## APPELLANT'S PETITION FOR A REHEARING.

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## APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:*

The libelant respectfully petitions the court for a rehearing of his appeal and for reconsideration thereof, and in support of his petition respectfully represents that the court has erred in its interpretation and application of the statutes as follows:

## I.

### SECTION 705, TITLE 46 U. S. C. A. HAS BEEN MISAPPLIED AND ERRONEOUSLY CONSTRUED.

The court has in effect held that Section 705 of Title 46 U. S. C. A. permits a seaman to be tried and "convicted" subsequent to the forfeiture. It is respectfully submitted that this statute cannot be construed to enable a shipowner to impose a forfeiture where no such right existed when the forfeiture was declared.

Some of the offenses set forth in Section 701 of Title 46 for which a forfeiture of wages is provided could be made the subject matter of a criminal proceeding. Imprisonment is a possible penalty provided by the act. Wilfully damaging the vessel, embezzling or wilfully damaging the stores or cargo are among the offenses punishable by imprisonment. A forfeiture of wages could also be made for such offenses even though they had not been the subject of a criminal proceeding. That Section 705 was intended to cover this situation is made clear by the words:

> * * * notwithstanding the offense in respect of which such question arises, *though made punishable by imprisonment as well as forfeiture,* has not been made the subject of any criminal proceeding. (Italics ours.)

The right to make the forfeiture of wages must exist at the time the forfeiture is made. The right to make a forfeiture under Paragraph Eight of Section 701 does not exist until there has been an act of

smuggling *"for which he is convicted."* The word "convicted" is in the past tense. Until there had been a conviction there was no right to make the forfeiture. This court now reads the statute as though it contained these words: for which he is convicted or might be convicted in any proceeding lawfully instituted with respect to such wages. The statute does not so read and should not be so construed.

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## II.

**SECTION 701, TITLE 46 U. S. C. A. LIMITS AND RESTRICTS THE MASTER'S OR SHIPOWNER'S ANCIENT RIGHT OF RECOUPMENT BY FORFEITURE OF WAGES.**

The court has declined to give effect to a statute clearly intended to modify the ancient right of a master or shipowner to impose forfeitures of wages to accomplish recoupment for losses caused by misconduct. *Shilman v. United States,* 164 Fed. (2d) 652 is cited as authority for the proposition that the ancient right of recoupment has "recently been recognized." This case, as we read the opinion, gives no support to such a proposition. In that case the right of "recoupment", if such it could be called, was denied and a recovery to the seaman for his wages was allowed against the government whose agents had attempted to collect a fine imposed for theft by deducting the amount of the fine from his wages. The court merely pointed out that the collection of the fine was not the same as recoupment for a loss oc-

curring during the course of a voyage and caused by misconduct. The cases cited were held inapplicable upon that ground. In the case at bar they are inapplicable because they were decided prior to the enactment of the statute which appellant claims was intended to correct the evil caused by the harshness of those very decisions.

For more than one hundred years (1833-1941) the statutory federal courts of this nation refused to recognize a limitation which Congress placed upon *their* power to punish for contempt. The climax in the court's determination to sustain its ancient right to punish for contempt was reached by the Supreme Court in 1918 in the case of *Toledo Newspaper Co. v. United States,* 247 U.S. 402; 38 S. Ct. 560 wherein Justice White erroneously declared:

> * * * there can be no doubt that the provision [Section 385 Title 28 U. S. C. A.] conferred no power not already granted and imposed no limitations not already existing.

The law remained just that way until Justice Douglas exposed the error in the case of *Nye v. United States,* 313 U. S. 33, 61 S. Ct. 810 where he said:

> Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck impeachment proceedings. Congress was intent on curtailing that power.

So in the case at bar Congress for its own reasons placed limitations upon the power of masters or shipowners to impose forfeitures. These limitations should

be respected, and the statute, like other statutes relating to forfeitures and penalties should be strictly construed. See Judge Bourquin's decision in *Gordon v. United States et al.*, 298 Fed. 555 construing the very statutes here involved.

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CONCLUSION.

The court is of the opinion that the act in question was passed "to mitigate the intolerable conditions of seamen then existing." Are we to infer that the court believes that these conditions no longer exist, and, therefore, the plain terms of the statute can be ignored?

The court says that it is possible to reconcile its results with the provisions of the act, but it declines to do so, stating that it will not pursue "barren dialectics." We have been unable to reconcile the trial court's decision with the provisions of the act through dialectics or otherwise; hence, this appeal. The questions which we have presented by this appeal are still unanswered. Does "cynical contempt" for the regulations of a greedy European power (Tr. 73) furnish a legal excuse and relieve an appellate court from the performance of a plain duty? If the affirmance of the decree requires the pursuit of barren dialectics, the more readily will the error of the lower court be exposed. The court's aversion to libelant's "furtive hangdog claims" affords no legal excuse to dispose of his appeal upon general prin-

ciples without regard to the statutes governing the transaction. A rehearing should be granted.

Dated, Portland, Oregon,
July 18, 1949.

Respectfully submitted,
K. C. Tanner,
Samuel L. Levinson,
Edwin J. Friedman,
*Proctors for Appellant and Petitioner.*

## Certificate

I hereby certify that I am one of appellant's counsel; that I prepared the foregoing petition for rehearing, and in my judgment it is well-founded. I further certify that said petition is not interposed for delay.

K. C. Tanner,
*Of Counsel.*